

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

ALLIED AQUATICS, INC.,)	
)	
Appellant,)	PCHB No. 89-145
)	
v.)	
)	FINAL FINDINGS OF FACT,
State of Washington, DEPARTMENT)	CONCLUSIONS OF LAW
OF ECOLOGY,)	AND ORDER
)	
Respondent.)	

This is an appeal of the Department of Ecology's issuance of a \$3,000 civil penalty for the discharge of a copper-containing aquatic herbicide on August 15, 1990, to a community pond near Star Lake in Mason County without obtaining a water quality standards modification.

On November 2, 1990, the Board issued an Order granting partial summary judgment to the Department on the issue of liability.

On January 10, 1991, a hearing was held on the issue of the reasonableness of the penalty. Present for the Pollution Control Hearings Board were: Chair Judith A. Bendor, presiding, and Members Harold S. Zimmerman and Annette S. McGee.

Appellant Allied Aquatics, Inc. was represented by its President, Douglas Dorling. Respondent Department of Ecology was represented by Allen T. Miller, Jr., Assistant Attorney General. The proceedings were reported by Marilyn A. Johnson of Gene Barker and Associates. Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was made.

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
PCHB No. 89-145

1 The Board reviewed the record, conferred, and by a letter dated
2 January 16, 1991, announced the penalty was affirmed. At the Board's
3 request, prevailing party DOE filed and served Proposed Findings,
4 Conclusions and Order.

5 Today's Order confirms the Board's January 16, 1991 oral ruling,
6 and for convenience also contains the November 2, 1990 Findings and
7 Conclusions Granting Partial Summary Judgment.

8 FINDINGS OF FACT

9 I

10 Allied Aquatics (Allied), is a company in the business of
11 applying aquatic herbicides in waters of the state to control the
12 growth of plants considered undesirable by waterfront property owners.

13 II

14 The State of Washington Department of Ecology (DOE) is
15 responsible for conducting a regulatory program on aquatic herbicide.
16 Each aquatic herbicide application has to be authorized in advance
17 before it can proceed. The State issues an administrative order
18 which, on a short-term basis, modifies water quality standards for the
19 location where the herbicide is to be applied. Such orders set forth
20 the time frame, location, and type of chemicals to be used, and might
21 list other conditions.

22 III

23 On August 15, 1989, Allied Aquatics applied a copper-containing
24 aquatics herbicide to a community pond adjacent to Star Lake in Mason

1 County. The Lake is officially designated Lystair Lake on the
2 U.S.G.S. quadrangle map.

3 IV

4 Allied Aquatics applied the herbicide to the pond without
5 obtaining a temporary water quality modification from the Department
6 of Ecology. Dead coho salmon fingerlings were seen in the pond on
7 August 16, 1990.

8 Water samples taken that day revealed copper concentrations of
9 796 micrograms per liter, which is in the upper range of acute
10 toxicity for fingerlings. Five hundred micrograms per liter produces
11 almost total mortality within 24 hours. The discharge of the
12 herbicide in the pond killed the fish.

13 V

14 On October 10, 1989, DOE sent Notice of Penalty Incurred and Due
15 No. DE 89-199 to Allied Aquatics asserting the violation and assessing
16 a \$3,000 fine under the provisions of RCW 90.48.144. Allied Aquatics
17 appealed to this Board, and the appeal was numbered PCHB No. 89-145.

18 VI

19 On July 20, 1990, DOE filed a motion, memorandum and affidavits
20 in support of partial summary judgment on the issue of Allied's
21 liability for the violation. Appellant was provided several
22 opportunities to reply to the motion, the latest being October 29,
23 1990 (Board Order October 18, 1990). No reply was filed. After
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1 review of these filings, the Board concluded that a violation had
2 occurred, and issued an Order November 2, 1990.

3 VII

4 The hearing record reveals that prior to this incident Allied
5 Aquatics had 11 separate violations of Chapt. 90.48 RCW in their
6 application of aquatic herbicides, resulting in \$12,000 in penalties.
7 Exh. R-1.

8 VIII

9 Any Conclusion of Law deemed to be a Finding of Fact is hereby
10 adopted as such.

11 From these Findings of Fact, the Board makes these

12 CONCLUSIONS OF LAW

13 I

14 The Board has jurisdiction over the parties and the subject
15 matter. Chaps. 90.48 and 43.21B RCW.

16 II

17 The pond adjacent to Star Lake is a water of the state under RCW
18 90.48.020. CH2O, Inc. v. DOE, PCHB No. 84-182 (1985).

19 III

20 Allied's discharge of a copper-containing herbicide to the pond
21 on August 15, 1990 violated RCW 90.48.080 as a discharge of polluting
22 matter. Ellensburg Water Co. v. DOE, PCHB No. 86-232 (1988). Allied
23 did not obtain a temporary water quality modification prior to
24
25

1 applying this pollutant, in violation of Chapt. 90.48 RCW and Chapt.
2 173-201 WAC.

3 IV

4 We turn to the issue of the reasonableness of the penalty.

5 The principal goal of civil penalties is to change behavior, to
6 promote compliance by the particular violator and the public at large.
7 Cosden Oil v. DOE, PCHB No. 85-111 (1986); Allied Aquatics v. DOE,
8 PCHB Nos. 89-16, -17, -118 (1990). The maximum penalty possible was
9 \$10,000.

10 The record discloses (Finding of Fact VII), that prior to this
11 incident Allied Aquatics had not been complying with the state of
12 Washington water pollution laws and regulations when applying aquatic
13 herbicides. In addition, the herbicide application in this instance
14 killed coho salmon fingerlings.

15 We conclude the \$3,000 was reasonable.

16 V

17 Any Finding of Fact which is deemed a Conclusion of Law is hereby
18 adopted as such.


19 From these Conclusions of Law, the Board enters the following
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ORDER

Penalty Order No. 89-199 in the amount of \$3,000 is AFFIRMED in full.

DONE this 13th day of March, 1991.

POLLUTION CONTROL HEARINGS BOARD


JUDITH A. BENDOR, Chair and Presiding


HAROLD S. ZIMMERMAN, Member


ANNETTE S. MCGEE, Member

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